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JOINT PETITION OF

BELL ATLANTIC CORPORATION

CASE NO. PUA980031

and

GTE CORPORATION

**For approval of agreement
and plan of merger**

HEARING EXAMINER'S RULING

January 25, 1999

On December 30, 1998, AT&T Communications of Virginia, Inc. ("AT&T") filed a Motion to Compel and for an Extension of Time to File Comments ("Motion"). In its Motion, AT&T asks the Commission to compel Bell Atlantic Corporation ("Bell Atlantic") immediately to deliver all information and documents responsive to its first and second set of interrogatories in the above-captioned proceeding. AT&T further requests that it be provided with an extension of time to file its comments in this proceeding. On January 4, 1999, AT&T amended paragraph number eight of its Motion to reflect the receipt of additional documents from Bell Atlantic. The receipt of these documents does not affect, significantly, the issues raised by AT&T's Motion.

On January 6, 1999, Bell Atlantic filed an Answer to AT&T's Motion in which it defended its objections to AT&T's interrogatories and requested that the Commission deny AT&T's Motion. On January 7, 1999, the Commission entered an order that permits AT&T to file supplementary comments, on or before January 29, 1999, for any topic on which Bell Atlantic had not responded to discovery. In its order dated January 14, 1999, the Commission appointed a Hearing Examiner for the limited purpose of ruling upon all discovery matters. Further, the Commission directed the Hearing Examiner to establish appropriate procedures to resolve discovery issues as they arise.

AT&T's first set of interrogatories consisted of one request that asked for Bell Atlantic's responses to the discovery requests of all other parties and the Commission Staff. Specifically, AT&T complains that in regards to Bell Atlantic's responses to Interrogatory Nos. 12, 14, and 15 of Staff's Fifth Set, rather than providing copies of responses to these questions, Bell Atlantic only offered AT&T an opportunity to review the responding documents at Bell Atlantic's offices. In its Answer, Bell Atlantic states that the documents related to the three Staff questions at issue include confidential, draft shareholder proxy statements filed by GTE Corporation and Bell Atlantic with the SEC, minutes of Bell Atlantic Board of Directors Meetings, and a confidential financial report submitted by a Bell Atlantic subsidiary to the FCC. Bell Atlantic further contends

that the Commission's Protective Order in this case¹ only requires it to provide "access" to confidential documents, which it did by offering AT&T an opportunity to review the documents at Bell Atlantic's offices.

The purpose of the *Protective Order* is to protect and facilitate the passing of confidential information between the parties, Staff, and Commission in this case. Staff is subject to the provisions of the *Protective Order*. By signing the *Protective Order*, counsel for AT&T also are subject to the order's provisions. Thus, by being subject to the provisions of the same *Protective Order*, AT&T should be entitled to the same responses Bell Atlantic provided to the Staff. Accordingly, I find that if in response to Interrogatory Nos. 12, 14, and 15 of Staff's Fifth Set, Bell Atlantic provided Staff with copies of documents, then Bell Atlantic should be required to provide copies of those documents to counsel for AT&T. On the other hand, if Bell Atlantic's response to Staff was that the documents would be made available for inspection at Bell Atlantic's offices, then Bell Atlantic's response in kind to AT&T is sufficient.

AT&T's second set of interrogatories consisted of seven questions or requests for information. In its response to this set of interrogatories, Bell Atlantic offered seven general objections that it incorporated into each answer provided to AT&T. Most of the controversy regarding AT&T's second set of interrogatories centers on Bell Atlantic's general objections. Therefore, each of these objections will be examined before addressing Bell Atlantic's responses to specific questions.

First, Bell Atlantic objected to the production of any confidential or proprietary information unless the requesting party was bound by the provisions of the *Protective Order*. As described above, counsel for AT&T have agreed to be bound by the provisions of the *Protective Order*. Therefore, Bell Atlantic's first general objection now appears moot.

Second, Bell Atlantic objected to the production of information which is subject to the attorney/client privilege or work product privilege. AT&T does not dispute that Bell Atlantic may withhold privileged documents. Instead, AT&T requests that for each interrogatory Bell Atlantic withholds documents on the basis of a claim of privilege, that Bell Atlantic provide a list of all such documents, the privilege asserted, and a summary of the contents of each document withheld. AT&T argues that such a privileged document list is the only means of testing Bell Atlantic's privilege claims. In its response, Bell Atlantic asserts that the privileged document list requested by AT&T is unnecessary and burdensome. Counsel for Bell Atlantic also argues that he is unaware of the Commission ever imposing such a requirement.

In the *Protective Order*, the Commission imposed the duty of preparing a detailed log where documents were withheld because the responding party deemed the requested documents to be "competitively sensitive."² Moreover, GTE Corporation, Bell Atlantic's co-petitioner,

¹ *Joint Petition of Bell Atlantic Corporation and GTE Corporation For approval of agreement and plan of merger*, Case No. PUA980031, Protective Order (December 17, 1998) ("*Protective Order*").

² *Id.* at ¶ 5.

recently provided lists of privileged documents in Case No. PUC980080. Finally, in Case No. PUE960296, the Commission ordered that “[a]nswers to interrogatories or data requests containing assertions of confidentiality, privilege or other immunity shall contain the factual and legal predicates to any such claim in sufficient detail for the requesting party to ascertain the Company’s right to claim such status.”³ Consequently, I find AT&T’s requested privileged document lists should be provided.

Third, Bell Atlantic objects to providing any information generated prior to January 1, 1997. AT&T is willing to use January 1, 1995, as the cutoff date for responsive discovery documents. In its Response, Bell Atlantic questions the relevancy of documents prepared prior to January 1, 1997, because laws relating to competition among telephone companies were different prior to the passage of the federal Telecommunications Act of 1996 (“1996 Act”), and because Bell Atlantic claims that only its current policies should be relevant to this proceeding. AT&T supports its cutoff of January 1, 1995, by pointing out that this date precedes the enactment of the 1996 Act by one year and encompasses a period in which Bell Atlantic may have studied its competitive entry into GTE’s territory.

Rule 6:4 of the Commission’s Rules of Practice and Procedure establishes a broad standard for discovery.

Interrogatories may relate to any matter, not privileged, which is relevant to the subject matter involved It is not necessarily grounds for objection that the information sought will be inadmissible at the hearing if such information appears reasonably calculated to lead to the discovery of admissible evidence.

Here, Bell Atlantic questions the relevance of any document prepared before 1997, based on changes in law and changes in its policies. In this regard, Bell Atlantic characterizes the laws relating to competition among telephone companies as “very much different prior to passage of the 1996 Act.”⁴ I disagree. In 1995, the Virginia General Assembly enacted Va. Code §§ 56-265.4:4 C and 56-481.2 to open local exchange telephone service markets throughout the Commonwealth to competition. The 1996 Act caused little change to Virginia’s law relating to competition among telephone companies for local exchange service. Thus, studies weighing competitive options in Virginia prepared in 1995 may have relevance in this case and appear reasonably calculated to lead to the discovery of admissible evidence.

As to Bell Atlantic’s argument that only its current policies are relevant in this case, even if true, fails to support the adoption of a January 1, 1997, cutoff date. On discovery, information from 1995 could be necessary to establish the origin of Bell Atlantic’s current policies and may be useful for the purposes of understanding the evolution or development of such policies.

³ *Commonwealth of Virginia, At the relation of the State Corporation Commission, Ex Parte: Investigation of electric utility industry restructuring – Virginia Electric and Power Company*, Case No. PUE960296, Order Granting Motion to Compel in Part, at 15 (September 29, 1997).

⁴ Answer of Bell Atlantic, at ¶ 7.

Therefore, I find that AT&T's suggested cutoff date of January 1, 1995, should be used instead of January 1, 1997, as proposed by Bell Atlantic.

Fourth, Bell Atlantic objected to providing information which was not generated by, or maintained in the files of a Bell Atlantic employee at the Director level or above. In its Motion, AT&T agreed to this limitation, with the exception of situations where Bell Atlantic has reason to believe that the information is held by a Manager. In its Answer, Bell Atlantic did not reply or object to AT&T's modification. Accordingly, I find that Bell Atlantic may limit providing information that was not generated by, or maintained in the files of a Bell Atlantic employee at the Director level or above. If Bell Atlantic has reason to believe that such information is held by a Manager, such documents also should be provided.

Fifth, Bell Atlantic seeks to limit discovery to information that directly concerns the market for telecommunications services in the Commonwealth of Virginia. In its Motion, AT&T complains that this restriction could lead to the withholding of broadly formulated, higher executive level plans. In its Answer, Bell Atlantic describes the purpose of its limitation as confining its document search "to documents relevant to Virginia," excluding "general documents which might have talked about competing against other local exchange companies outside of Virginia."⁵

As discussed above, the standard for discovery before the Commission is broad. While I agree that information directly related to competing against other local exchange companies outside of Virginia lacks relevance to this proceeding, I also agree that broadly formulated, executive level plans may be relevant. Consequently, Bell Atlantic's general objection should be reformulated to exclude information that is not "related to" the market for telecommunications services in the Commonwealth.

Sixth, Bell Atlantic objects to any request seeking information "relating to" a specific subject matter. Instead, Bell Atlantic seeks to limit all interrogatories to information which "directly" discusses the specific subject matter. As discussed above, the Commission's Rules provide for broad discovery. Indeed, the Commission's Rules specifically provide for discovery that "may relate to any matter, not privileged, which is relevant to the subject matter involved."⁶ Therefore, Bell Atlantic may not limit discovery to information that "directly" discusses the specific subject matter.

Seventh, Bell Atlantic objects to providing any information that was not initially created by Bell Atlantic, its affiliates, at its direction, or on its behalf. AT&T agrees to this objection.⁷

In addition to the seven general objections made by Bell Atlantic, AT&T seeks to compel a specific response to the seventh question of its second set. This interrogatory seeks information and documents regarding the impact which the merger of Bell Atlantic and GTE will have on

⁵ *Id.* at ¶ 10.

⁶ Commission's Rules of Practice and Procedure, Rule No. 6:4.

⁷ Motion, at ¶ 17.

access charges in Virginia. Bell Atlantic responded by incorporating the general objections discussed above and by providing the following:

Subject to and without waiver of those objections, Bell Atlantic states, as set forth in the Joint Application, that the merger will have no impact on the regulatory plans under which either Bell Atlantic Virginia or GTE South is regulated and have no impact on the Commission's authority (and that of the FCC) concerning access charges.⁸

In its Motion, AT&T protests that Bell Atlantic did not provide any documents in response to this interrogatory. In its Answer, Bell Atlantic claims that because access charges are not at issue in this case, the interrogatory fails to be relevant. I agree. Access charges are not at issue in this proceeding. In the past, the Commission has opened separate proceedings to study and set access charges. Consequently, I find that Bell Atlantic should not be compelled to provide further information in response to AT&T's interrogatory. Accordingly,

IT IS DIRECTED that Bell Atlantic immediately provide the following information to AT&T:

In response to **Interrogatories and Requests for Production of Documents (First Set) to Bell Atlantic Corporation by AT&T Communications of Virginia, Inc. – Question No. 1**, Bell Atlantic shall provide the same response to AT&T as it originally provided to the party (including Staff) making the request.

In response to **Interrogatories and Requests for Production of Documents (Second Set) to Bell Atlantic Corporation by AT&T Communications of Virginia, Inc.**, Bell Atlantic shall amend its general objections and responses to Question Nos. 1 through 6 as specified below:

General Objection No. 2 – For each question that Bell Atlantic withholds information because it is subject to the attorney/client privilege or work product privilege, Bell Atlantic shall provide a list of documents withheld, the privilege asserted for withholding each document, and a summary of the contents of each document withheld;

General Objection No. 3 – Bell Atlantic shall substitute “January 1, 1995” for “January 1, 1997.” Thus, the last sentence of this objection shall read, “Bell Atlantic will produce responsive material which is otherwise not objectionable for the time period January 1, 1995 onward;”

⁸ Motion, Attachment 2, at 9.

General Objection No. 4 – Bell Atlantic shall amend its objection to provide also for the provision of documents where Bell Atlantic has reason to believe that responsive documents are in the possession of Managers but not their Directors;

General Objection No. 5 – Bell Atlantic shall substitute “is not related to” for “does not directly concern.” With this change, Bell Atlantic’s general objection shall read, “Bell Atlantic objects to any request on the grounds of overbreadth, undue burden and relevance to the extent it seeks information which is not related to the market for telecommunications services in the Commonwealth of Virginia;” and

General Objection No. 6 should be struck in its entirety.

Bell Atlantic is not required to provide any additional information in regards to Question No. 7 of AT&T’s Second Set and is not required to provide information regarding Question Nos. 1 through 6 of AT&T’s Second Set where the information falls within Bell Atlantic’s general objections as modified above.

Alexander F. Skirpan, Jr.
Hearing Examiner